

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KANDRA LENISE WALKER,

Defendant-Appellant.

UNPUBLISHED
December 1, 2011

No. 294313
Wayne Circuit Court
LC No. 08-008310-FH

Before: M. J. KELLY, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals her bench trial convictions of assault with intent to do great bodily harm, MCL 750.84, and six counts of assault with a dangerous weapon (felonious assault), MCL 750.82. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to 71 months to 15 years in prison for the assault with intent to do great bodily harm conviction, and 28 months to 6 years in prison for the six felonious assaults convictions. For the reasons set forth below, we affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant does not challenge her convictions for her conduct toward Myeasha Lee, but she contends that the prosecution presented insufficient evidence to support the five other counts of felonious assault. According to defendant, she did not have the requisite intent to commit felonious assaults against Nicole Williams and George Lee. She further claims that the doctrine of transferred intent does not apply to the felonious assaults against the children, Jordan Lee, Amere Jordan, and George Lee, Jr., and that the prosecution failed to provide any independent additional evidence to prove that she intended to assault the children.

We review a claim regarding insufficiency of the evidence de novo. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). “We examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt.” *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). The prosecution may establish the elements of a crime from circumstantial evidence and reasonable inferences arising therein. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of felonious assault are “(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). An assault occurs when one attempts to commit a battery or place someone in apprehension of a battery. *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004). A battery is an unlawful harmful or offensive touching of another. *Id.* Under the doctrine of transferred intent, the law transfers a defendant’s intent to harm a third person when the defendant harms an unintended victim while trying to harm the third person. *People v Lovett*, 90 Mich App 169, 171-172; 283 NW2d 357 (1979). In applying the doctrine, the victim is irrelevant; it is only important that the prosecution prove that the requisite state of mind existed to meet the intent element of the crime. *People v Lawton*, 196 Mich App 341, 351; 492 NW2d 810 (1992).

We hold that the prosecution presented sufficient evidence for a reasonable finder of fact to find that defendant committed the five additional counts of felonious assault. The record shows that Myeasha and George pushed each other out of the way as defendant drove her Explorer toward them. Nicole Williams recounted that she saw defendant “recklessly trying to run people over.” Defendant also placed George in apprehension of an immediate battery when defendant drove “full speed” toward Myeasha’s vehicle, a Mercury Cougar. George, only having a few seconds before impact, turned and tried to jump out of the way. The record shows that after defendant hit George with her Explorer, she reversed, and rammed the Mercury two or three times. Nicole, who stood near the Mercury, backed up immediately from the Mercury out of fear that defendant would harm her as defendant had just harmed George. Thus, though defendant argues that she only intended to damage the Mercury, the evidence shows that defendant also intended to assault George and Nicole. Accordingly, there is sufficient evidence to establish that defendant feloniously assaulted George and Nicole.

There is also sufficient evidence for a reasonable trier of fact to find that defendant committed felonious assaults against the three children. Again, there is sufficient direct and circumstantial evidence for a reasonable trier of fact to find that defendant intended to place George and Nicole in apprehension of an immediate battery, thereby warranting the application of the transferred intent doctrine regarding the assaults upon the children. Further, evidence also supports a reasonable inference that defendant knew the children were inside the Mercury and, therefore, that she intentionally assaulted them. During the entire sequence of events, the children remained inside the vehicle. Defendant drove past the Mercury, where the children were seated, on at least two occasions. The record also shows that defendant pulled up next to the Mercury and argued with Myeasha, supporting the reasonable inference that defendant was aware that the children were in the Mercury during the incident. A reasonable trier of fact could find that this provided sufficient evidence to conclude that defendant knew that the children were in the Mercury and, as such, defendant intended to place the children in apprehension of an immediate battery. Thus, for this additional reason, we affirm defendant’s felonious assault convictions.

II. ASSISTANCE OF COUNSEL

Defendant claims that defense counsel was ineffective. An ineffective assistance claim “is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579, 640 NW2d 246 (2002). The trial court must make factual findings on the claim and resolve whether

defendant's right to effective assistance of counsel was violated. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008). This Court reviews the trial court's findings of fact for clear error while applying a de novo standard in its review of the trial court's resolution of the constitutional law questions. *LeBlanc*, 465 Mich at 579. A reviewing court will find clear error if it "is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497; 647 NW2d 480 (2002).¹

Defendant argues that defense counsel's failure to investigate and call witnesses was objectively unreasonable. We hold that defense counsel's performance did not fall below an objective standard of reasonableness. Decisions to call and investigate witnesses fall within trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Defense counsel is given wide latitude on matters of trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). On matters of trial strategy, we will not substitute our judgment for that of defense counsel or review the record with the added benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

As the trial court stated, it was not unreasonable to have an adult, Joseph Hester, testify in lieu of defendant's children on the same subject matter. Relying on defendant's statement that Hester would testify and taking into account the young ages of defendant's children, defense counsel decided not to call defendant's children to testify. On the last day of trial, defense counsel informed the trial court that he spoke with Hester's counsel and learned that Hester was involved in a separate trial regarding sexual misconduct allegations involving defendant's children. Hester's counsel then appeared on record and stated that Hester decided to invoke his Fifth Amendment privileges and refrain from testifying because his testimony may affect his upcoming trial. At this point, defendant did not have any other potential witnesses available. Upon reviewing this evidence, it was not unreasonable for defense counsel to decline to call Hester, someone who not only had a pending trial but also attacked the Mercury with a golf club, or defendant's young children, who were the alleged victims of sexual misconduct.

The trial court also correctly ruled that defense counsel acted reasonably in not introducing evidence that Myeasha Lee was the aggressor. The record shows that defense counsel thoroughly cross-examined Myeasha concerning the events that occurred on the incident date, emphasized Myeasha's aggressive activity, and discussed defendant's self-defense theory in his closing argument. Defense counsel could have reasonably decided not to highlight Myeasha's threatening behavior toward defendant because it could have served as a motive for the assault with intent to do great bodily harm and felonious assaults. Defendant's present counsel argued at the post-conviction hearing that he located several police reports that

¹ To establish an ineffective assistance of counsel claim, a defendant must show that "counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different. *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). We presume that defendant received effective counsel and place a heavy burden on defendant to prove otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

demonstrate that Myeasha has a violent character. As stated by the prosecution, and not challenged by defendant, only one incident predated the May 2008 incident and that particular incident involved defendant. Consequently, it was not unreasonable for defense counsel to conclude that the introduction of this evidence would actually support the prosecution's case by showing that defendant had a motive for the assaults.

Furthermore, the failure to call a witness or present other evidence only constitutes ineffective assistance of counsel when it deprives defendant of a substantial defense. *Payne*, 285 Mich App at 190. For a defense to be substantial it must be one that might have made a difference at trial. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). As stated, if defense counsel introduced evidence to prove Myeasha was the initial aggressor, this evidence could have actually harmed defendant's case by showing that defendant had a motive for her actions. Therefore, defense counsel did not deprive defendant of a substantial defense by deciding not to call defendant's proposed witnesses to testify or by refraining from introducing evidence that would have implicated Myeasha as the aggressor.

Were we to find that defense counsel erred in failing to impeach Myeasha with her prior unarmed robbery conviction, defendant failed to show that this decision prejudiced her trial. The record shows that Nicole Williams' testimony and, for the most part, George's testimony, corroborated Myeasha's testimony and this nullified the impeachment evidence. Accordingly, we hold that defendant has not established that defense counsel was ineffective.

Affirmed.

/s/ Michael J. Kelly
/s/ Henry William Saad
/s/ Peter D. O'Connell